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Getting Away With It

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Getting Away With It

Corruption, Moral Indignation and the Limits of Legal Accountability.

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Abstract

In this paper we address the idea of ‘legal but corrupt’ through a discussion of two cases: abuse scandals in the Irish Catholic Church and the financial services industry in the wake of the Global Financial Crisis. We identify two important dynamics that generated the scandals: that they were driven by strong and stable groups existing within a peculiar kind of ‘accountability space’ that we describe as ‘monastic’ and that those groups persisted with tacit or explicit support from the state. ‘Legal but corrupt’ is, we argue, a matter of insider incomprehension sustained by the ceding of sovereignty over some aspect of social or economic life.



1 Introduction

In this short paper we address a number of key issues relating to the ‘legal but corrupt’ theme. We pay special regard to two cases: first the Irish Catholic Church and then, at greater length, the regulatory dimensions of the Global Financial Crisis (GFC). We discuss the question of how ‘legality’ was and is negotiated between the state and the finance services industry. Regulation, we argued, allowed for the emergence of a private regime with a major public role but that was largely autonomous from broader regulatory dynamics. We then go on to discuss the construction of responsibility within financial services, from the point of view of senior officers’ reflections on what ‘went wrong.’ We highlight the manner in which market dynamics were presumed to hold financial institutions and their officers in their sway. Finally, third, we link these two issues to explain the continuing pressure to force financial services regulation to step back and allow self-regulation to come to the fore again.

Before we begin, however, it is important to note that we have to take a particular stance on 'legal but corrupt' in this paper. Taking the GFC, for instance, beyond various kinds of financial crime at the margins,ⁱ and stories of criminal dealing like that involving Anglo-Irish Bank as outlined below, the managerial actions behind the GCC are difficult to describe as criminal or illegal in other terms, or at least explicitly as being instances of either financial or '*quid pro quo*' corruption. The legal protection of bad business judgement is not at stake in this paper, and nor are the terms of how business judgement is imagined in and through law.ⁱⁱ We are interested rather in why a disconnect might form, including in law, between widespread senses of fairness, desert or blameworthiness and the self-perceptions of elite actors within particular sectors. Our perspective on 'legal but corrupt' in this context ought to be read as a perspective on '*largely legal* but *resented* actions' and how such actions are legitimated through law and are also explained and legitimated in specific managerial contexts.



2 Private Social Actor and the Autonomy of the Corrupt: Lessons from the Irish Catholic Church

Let us explain these perspectives with reference to the an issue that is seemingly quite distant from the GFC: the Irish Catholic Church. The Church has been defined by institutional denial, cover-ups, and obstruction regarding child sexual abuse across a long period in Irish history. Note that we do not in any way seek to draw an equivalence between the underlying failings in the Irish Catholic Church and the systemic failings that led to the Global Financial Crisis and its local manifestations. Our aim rather is to explore strong institutional autonomy, the idea of particular groups being 'out of touch' and the idea that those same groups have in some way conducted themselves in a corrupt manner. We aim to outline the difficulty state regimes, whether through law or other regulatory forms, have in negotiating a place for strong and cohesive private forces within society, perhaps in particular when those forces have a significant social presence and impact.

In July 2011 the Irish Department for Justice, Equality and Law Reform published the Cloyne Report into the abuse of children by members of the Catholic Clergy in the Diocese of Cloyne, situated around County Cork at the southern end of Ireland (Investigation into the Catholic Diocese of Cloyne 2011). The report, addressing conduct within the Diocese since 1996 when the Irish Bishops Conference published a Framework Document outlining detailed procedures for dealing with allegations of child sexual abuse involving clergy, pointed to a failure on the part of senior actors within the Church not only to recognise the scale or seriousness of child abuse but even to take an interest in the matter at all. There was a widespread failure in Cloyne as a result to implement the Church's own procedures governing abuse (Investigation into the Catholic Diocese of Cloyne 2011, 1.15ff). The report also pointed to the intervention of central Church authorities in the Vatican aimed at undermining the framework document, an intervention that, the report noted "effectively gave individual Irish bishops the freedom to ignore the procedures which they had agreed and gave comfort and support to those who ... dissented from the stated official Irish Church policy" (Investigation into the Catholic Diocese of Cloyne 2011, p. 1.18). At the heart of this failure was the Church's policy of mandatory reporting of allegations of child sexual abuse to the relevant civil authorities, a matter that the Vatican had stated in communication to the Irish Church "gives rise to serious reservations of both a moral

and a canonical nature” (Investigation into the Catholic Diocese of Cloyne 2011, p. 1.18). The institutional imperative, it seemed was that of preserving Church autonomy and its separation and independence from state oversight, regulation and law.

Responding to the Report’s publication in a speech to Dáil Éireann (the Irish Parliament), Taoiseach (Prime Minister), Enda Kenny said:

Cardinal Josef Ratzinger said: ‘Standards of conduct appropriate to civil society or the workings of a democracy cannot be purely and simply applied to the Church.’ As the Holy See prepares its considered response to the Cloyne Report, as Taoiseach, I am making it absolutely clear, that when it comes to the protection of the children of this State, the standards of conduct which the Church deems appropriate to itself, cannot and will not, be applied to the workings of democracy and civil society in this republic. Not purely, or simply or otherwise.

He also said that

[T]his is not Rome. Nor is it industrial school or Magdalene Ireland, where the swish of a soutane, smothered conscience and humanity and the swing of a thurible ruled the Irish Catholic world. This is the Republic of Ireland in 2011. It is a republic of laws, rights and responsibilities and proper civic order where the delinquency and arrogance of a particular version of a particular kind of morality will no longer be tolerated or ignored (Kenny 2011; the second passage is quoted in McAlinden 2013).

The Cloyne report came at a point where knowledge of historical child abuse was widespread and had been for close on two decades. The shock of Cloyne was in its outlining bureaucratic resistance to culpability, to state authority and ultimately to reform. The report acted not only as an exemplar in exposing the intimacy of symbiotic church-state relations in recent Irish history but also, as McAlinden has it, “the tendency for Church and State ‘communities’ to deny or minimise wrongdoing, and the stark contrast between their ‘imagined selves’ and the legacy of an abusive past” (McAlinden 2013, p. 192; drawing on Anderson 1983; Cohen 2000).

So why have prosecutions for conspiracy been absent in the wake of the abuse scandals? Why, especially, when evidence of long-standing conspiracies not to report criminal acts to the state’s authorities is widespread and persuasive? In the context of this paper we suggest two reasons: first that the state was implicated in the long series of cover-ups and often actively supported Church leaders in covering up crimes. This could easily be seen as tacit (or explicit at times) state permission for the Church to maintain its autonomy and sovereignty, for instance through collusion between the Gardaí (the Irish police) and bishops (Holohan 2011, 153ff). This enabled the Church’s senior officers to choose how abusers would be regulated (often by moving them on to other parishes where they continued to abuse). A second reason is that the state responded to the crisis by negotiating a settlement with the church – by opting for stability over confrontation – where the taxpayer footed most of the bill for compensation for victims (see McDonald 2006).

While in many ways this was an appropriate response – the state’s failure to protect its citizens was at the heart of the scandal – it also served to insulate those at the pinnacle of the Church from the profound self-examination that might otherwise have been necessary. This insulation allowed the church to maintain its self-conception as an essentially private and sovereign moral community within the broader community, answering to its own rules and lines of authority that were explained by strongly enforced special ‘associative’ norms (henceforth, following Dworkin 1986, we employ the term ‘associative obligations’).

These obligations shaped Bishops’ outlooks on how they ought to interact with state investigatory agencies. This was articulated by Archbishop Connell of Dublin, who saw a direct contradiction between cooperation with police and his associative obligations to the Church.

In 2002, Archbishop Connell allowed the Gardaí access to archdiocesan files. The decision to do that, Connell told the Commission of Investigation, ‘created the greatest crisis in my position as Archbishop’ because he considered it conflicted with his duty as a bishop, to his priests. When asked why, he explained:

Was I betraying my consecration oath in rendering the files accessible to the guards? ...you’ve got to remember that confidentiality is absolutely essential to the working of the bishop because if people cannot have confidence that he will keep information that they give him confidential, they won’t come to him. And the same is true of priests (Holohan 2011, p. 120).

Within the confines of this paper, we posit two dynamics from the scandal whose interaction had a determinative effect on the situation. First, the **strong internal narratives and associative obligations allowed a peculiar kind of ‘accountability space’ to develop**, characterised not solely by the ‘forum,’ to draw on Bovens’s (2007a; 2007b) metaphor, but by what we might call ‘monastery’ (see Dubnick 2013). We use ‘monastery’ to denote a space characterised by a strong – and strongly enforced – normative vocabulary where internal narratives of virtue and vice, combined with patterns of mutual recognition and social esteem, exist (largely at least) independently of the forms of recognition and esteem that prevail in the surrounding society. The monastery is managed both as a unified accountability space and as one that is cut off from the rest of society.

This kind of space is sustained, second, because it is *licensed* to do so: **it persists in the light of tacit or explicit support from the state**. While such support was of course at the heart of the longevity of *actual* monasteries (for one insight, see Rost et al. 2010) its role in the accountability space relates to protecting autonomous spaces both from scrutiny and from standards of conduct other than those set internally.



3 Associative Obligations and Accountability

Deepening our first point above, regarding the ‘monastery’ metaphor, the problem of associative obligations has been an important problem in social and legal philosophy for a number of years (see for instance Dworkin 1986, 195ff; Simmons 1996; Atkinson 1995; Hardimon 1994; Almond 2005; Orsi 2008). For us here suffice to say that of the kinds of duties that attach to roles reveals one important trait in modernity: the very strength with which associative obligations are brought to bear on organisational life. A moral community’s secession from the “general framework of [reactive] attitudes” (Strawson 1974, p. 25), can lead to mutual incomprehension between insiders and outsiders regarding the moral significance of actions to the decline of the patterns of moral recognition that are required for a general web of second-personal standpoints (Darwall 2006) to be sustained across society. A kind of enforced ‘*bounded*’ *moral rationality* can emerge.

In the case of scandals surrounding the Irish Catholic Church, such obligations were articulated through employment of the idea of the Church’s sovereignty under Canon Law.

We might imagine special obligations forming in less obviously hierarchical 'thick' circumstances (on 'thick' and 'thin' see Dubnick and O'Kelly 2005; O'Kelly and Dubnick 2006). Importantly, internal organisational power is brought to bear on its subjects through the organisation's capacity to arrange patterns of condemnation and approbation, sanctions and rewards and promotion and demotion. The exercise of power through various 'forums' (see Bovens 1998; Bovens 2007a; Bovens 2007b; Schillemans and Bovens 2011; Schillemans and Busuioc 2014) can influence the terms of more 'ground-level' accountability relationships as people seek to contend with the multiple, diverse and often conflicting expectations under which they live their lives (Dubnick 2014). While the consequence of that influence are difficult to predict, and while the power of the forum itself depends on the other relational spaces that form, the accountability spaces of firms, churches and other hierarchical organisations are themselves a kind of Coasian efficiency (Coase 1937). The desires and intentions of senior officers, that is, are communicated and enforced through the encouragement of particular patterns of conduct, the exclusion of other possible patterns of conduct and the excision of dissenters from the ranks.

The challenge such 'quasi-private but socially-public' regimes present for the public sphere is immense. Regulatory and policing regimes find it very difficult to access closed information systems and so transparency – conventionally held to be the core ingredient for accountability – becomes far more difficult. Internal cohesion, enforced through the promotion of common mentalities suggests that whistleblowers and more official sources of information are few and far between and face significant penalties when they step out of line. And so in short, the special obligations are a key component of the breakdown in the kinds of special moral measures and vocabularies that help explain situations where corruption identified from the outside are seen as loyalty, or stability, or even virtuous social service from the inside. This, rather than outright ineptitude might go to the heart – not of the terrible actions of abusers – but to the apparent confusion and even anger of Church leaders to popular rejections of their conspiracies to deal with abuse on their own partisan terms.



4 Global Financial Services Firms

While this problem has set in stark relief with regards to Ireland's Catholic Church, as outlined above, it is also apparent with the global, highly complex and opaque firms that have come to dominate industrial economies. Our second, more detailed, case focuses on the banking sector as it has emerged through the GFC, in large part to highlight similar lessons to those learned with regard to the Irish Catholic Church above. That is, that banking has emerged as an autonomous normative space – we are loosely tracking Polanyi's arguments about the 'disembedding' of market from society here (see Polanyi 1944; Picciotto 2011a) – with, in this case, both tacit and explicit support from the state. Our argument, beyond that, is that social narratives of corruption have little traction internally within such 'monastic' spaces and that law, in the light of state support, has few if any bases upon which to negotiate its entry into such spaces.

Following on from our second point above – that 'monastic' accountability are sustained because they are licensed to do so – we ought to recall that law is not a single predictable and knowable force. We should think of it instead as "a welter of conflicting principles, imperfect analogies, and ambiguous generalities" (Suchman and Edelman 1996, p. 932) that is negotiated between legislators and regulators and law's regulatory targets and subjects.

Law is, as such, always bounded by the terms of acceptability upon which law-makers and organisational insiders can agree. This is one reason why the 'monastic' accountability space can be so stable and long-lasting: it provides a strong and unwavering public narrative that is often both impermeable to broader narratives (or popular outrage) and simultaneously is persuasive to elite public actors who are amenable to the power of strong private actors.

To put this differently: we need to be wary of imagining law as simply acting upon passive subject and from there to thinking of regulatory failure as resulting at a basic level from some witting or unwitting lacuna in the law that is then subject to exploitation. Law and regulation is *fundamentally shaped* by the negotiation of terms public and private actors. That is *a crucial part of what law is*.

As such, we need to remember that both the concepts corruption and of law are imagined in the light of monastic – as we call them – private actors wielding power across society at large. Resentment of the apparently corrupt (going back to Strawson 1974), is not a simple matter because the self-contained moral communities that we describe here simply see their conduct as virtuous and socially beneficial:

'Is it possible to have too much ambition? Is it possible to be too successful?' Blankfein shoots back. 'I don't want people in this firm to think that they have accomplished as much for themselves as they can and go on vacation. As the guardian of the interests of the shareholders and, by the way, for the purposes of society, I'd like them to continue to do what they are doing. I don't want to put a cap on their ambition. It's hard for me to argue for a cap on their compensation.'

So, it's business as usual, then, regardless of whether it makes most people howl at the moon with rage? Goldman Sachs, this pillar of the free market, breeder of super-citizens, object of envy and awe will go on raking it in, getting richer than God? An impish grin spreads across Blankfein's face. Call him a fat cat who mocks the public. Call him wicked. Call him what you will. He is, he says, just a banker 'doing God's work' (Arlidge 2009).

This kind of perception helps explain the fact that the crisis seemed to lack a broader educative tone for banking: those who remained in business had their skills confirmed and those who did not were able to look to systems and circumstances for blame.

Banking is already characterised by the use of legal forms – corporate personality and limited liability for instance – to manufacture highly complex value chains (see for instance Neilson, Pritchard, and Yeung 2014, and other essays in the same special issue) and corporate groups (see Dine 2000; Picciotto 2011b), often as much in pursuit of tax and other kinds of arbitrage as they are in pursuit of production efficiencies (see Hadden 2012). Driven at least in part by the well-documented correlation between firm size and executive pay (see Girma, Thompson, and Wright 2007; Bliss and Rosen 2001; Cosh 1975), and in part by the advantages for liability inherent in structures that were too complex to govern, senior officers in banks participated not only in a headlong push for risk, but also in the use of rewards and incentives to communicate and enforce norms throughout the sector. The educative effect of bonuses and gaps between banking and non-banking pay in regional economiesⁱⁱⁱ – in London for instance – is likely to be significant both in terms of its positive effects on performance and in terms of its imposing the discipline of 'golden handcuffs' on workers who are tempted to dissent from 'monastic' norms.

The growing dominance of financial services has been matched at state level by the perception that financial services existed in a self-contained and self-regulating market, that firm complexity was best managed internally and that shareholder discipline restrained

any self-serving impulses on managers' parts.^{iv} What is really interesting, however, is how the GFC, when it came, did so little to disrupt such narratives.

One reason for this might be that those who were exposed to public opprobrium and censure could fall back on systemic circumstances to explain their institutions' failures. Here, for instance, is David Drumm, ex-CEO of Anglo-Irish Bank (reputed to be the 'world's worst bank'). Drumm explained the bank's failure by saying that "everybody believed that we were in a unique situation in Ireland. We had a great economy, we had tremendous fundamentals that would see us through and therefore life was good and we would continue to grow over time." (O'Dowd and Muldoon 2011) Similarly, for Fred Goodwin, ex-CEO of the Royal Bank of Scotland,

As you can imagine, I have gone over this time and time and time again in my own mind as to what was the point at which we should have seen this differently, and I keep coming back to at the time there was a view, not that things would continue forever, there was a definite mood that the economy in this country and generally was going to slow down, that financial markets were going to slow down; but at no point did anyone get the scale or the speed at which. That is really what has been so damaging about this slowdown. It was not that our business was premised on everything continuing to go upwards forever; but that things could turn as quickly as they did, I do not think anyone saw (*Oral Evidence to the Treasury Select Committee* 2009, Q1645)^v.

The line of Drumm and a number of others (see below) encapsulated a style of 'agent regret' where the line from actor to action is defined by 'moral luck' (Williams 1981; Zimmerman 1987). Action is held to be regretful but the actor does not 'own' it, morally speaking, because they were either acting within set roles – and so responsibility was diluted or absent (on which see Wolgast 1992) – or actions were harmful only in the light of external events.^{vi} Drumm's defence above draws on the second of the two: that harm came through (market) forces beyond his control. He excused himself by explaining that the bank's collapse was preceded by a consensus between Anglo executives, regulators and ministers over how to proceed and, as such, that he cannot stand out as a responsible party: he cannot take individual responsibility for collective actions (for one discussion of such matters, see Silver 2006).

There is no reason to doubt either Drumm's or Goodwin's sincerity in their excusing their behaviour, even if they had tended to self-praise when times were good (ably assisted by scholars at times. See Nohria and Weber 2003). What is interesting, however, is how such narratives helped to avoid disrupting the internal cohesion of banking's accountability spaces: by simply blaming circumstance, or even bad business judgement in the light of circumstance, countless problems in organisational form, corporate governance, state collaboration and the like were put aside.

This in turn might explain the willingness of the remaining population of senior bankers to respond to the crisis, if not in Blankfein's forthright tone, then in tone's that suggest a tin ear for public opinion (although no set of ears were so ill-tuned as that of Anglo-Irish Bank executives who were revealed in leaked tapes to have laughed and joked as they sought to deceive the Irish state as to the extent of their losses in an effort to lure the state into rescuing the bank (see Lyons and Sheridan 2013; on Anglo-Irish Bank's collapse, see Carswell 2011)). So, for instance, less than two weeks after HSBC was fined for its role in money laundering activities, its Chair stated that "there was 'an observable and growing danger of disproportionate risk aversion creeping into decision-making in our businesses as individuals, facing uncertainty as to what may be criticised with hindsight and perceiving a zero tolerance of error, seek to protect themselves and the firm from fu-

ture censure” (quoted in Arnold 2014). Or, earlier on in the crisis, Deutsche Bank CEO Josef Ackerman spoke out, telling an audience at Davos that “an ongoing ‘blame game’ and uncertainty over future regulatory changes threaten to weaken the financial sector, potentially inhibiting a recovery” (Watts 2010). Again, we ought not to take such statements as simply strategic. We ought to see them rather as reflecting general sentiments within the monastic communities that banking makes up. An apparent tin ear might well be finely tuned to the voices it can hear.

When it came to the state’s role in the crisis, the British state has been proactive in self-examination with regard to its regulatory role. As a consequence we do get a sense of how little capacity for action there was in the Financial Services Authority especially (see for instance FSA 2011), because the regulators themselves had abandoned the space to the insiders. In Ireland the situation was, if anything, even worse, with senior financial regulators both reluctant to regulate for fear of undermining Ireland’s ‘competitive’ climate and even participating in roadshows helping to drum up business for the financial services sector (see Honohan 2010, para 7.27).

Indeed, when three executives were placed on trial for an illegal loans scheme that had been designed to boost Anglo-Irish Bank’s shares as it neared collapse, and two were found guilty, they were spared a custodial sentence because, as the trial judge put it, “a State agency had led them into error and illegality” (quoted in Gartland 2014). The impression was not of a regulator who was colluding in corrupt actions, but of one who had self-consciously stepped away from regulating on the grounds that powerful insiders simply ought not to be regulated at all.



5 Conclusion

The close relationships between political and regulatory actors and bank executives in Ireland and elsewhere is symptomatic of a common perception that the ‘disembedded’ autonomy of the financial economy is not problematic. This is at its heart the crux of ‘legal but corrupt:’ that law is itself disempowered by its authors and indeed facilitates conduct that is at odds with the broader ‘moral economy.’ We should also recall that such conduct is likely not done simply in the face of public opinion – financial market actors, as with any others, rarely behave from self-consciously bad faith or motives. Instead they simply disagree with broader notions regarding the value of what they do or they are simply unaware of those broader notions – or of their depth.

‘Corrupt’ is as such something of a misnomer: it has very little explanatory power in this context, as it did with the case of the Irish Catholic Church above. Corruption is at this level in the eye of the beholder. Isolated moral communities find it hard to find terms through which they can communicate about their conduct with others. This ought to be law’s role: to negotiate those terms. But when law is not available, for whatever reason, then such terms are hard to come by.

‘Monastic’ accountability spaces, connected with strong and stable associative communities are particularly hard to access. This is even more the case when they possess economic or other social power to the degree that they can set out to neutralise law’s mediating role, in particular through the development of close relations with those in political power. Corruption in this case happens by license, but that license is not simply granted: it is part of a long-standing negotiation of sovereignty between a strong private actor and the authority of the state.

Notes

ⁱFor instance, see <http://www.sec.gov/spotlight/enf-actions-fc.shtml>.

ⁱⁱUK and Irish courts tend to be quite protective of business judgement and ‘duties of care, skill and diligence’ (*Re City Equitable Fire Insurance Company Ltd* 1925; *Re D’Jan of London Ltd* 1993; see also Arsalidou 2003; Brennan 2009). The United States represents perhaps a more interesting case, with prosecutors being more aggressive in prosecution in the wake of business failure, whether through prosecution related to ‘honest services’ or through various forms of pre-trial diversion. See for instance Casey 2010; Brickey 2005; O’Brien 2003; O’Brien 2012; Uhlmann 2013.

ⁱⁱⁱIn the UK for instance, workers in banking and business services have been the “principal beneficiaries of increased inequality” through their access to high wages (Bell and Van Reenen 2014, F8). In the United States, working in finance carries a 50% premium over working in other sectors, adjusting for education (Philippon and Reshef 2012).

^{iv}Perhaps it is unsurprising that ideological dynamics at state level paralleled private interests. Snider (2000), for instance, argues that economic interest is a significant factor in determining which theoretical perspectives gain traction.

^vOn Goodwin’s reign in the Royal Bank of Scotland, see Martin 2014; Fraser 2014.

^{vi}The classic example of this being the driver who kills a child who stepped out from behind a parked car. They may feel profound regret at the event and their role in it but they tend not to be held responsible for it.

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